United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

1-27-75 ORIGINAL

74-2282

To Be Argued by
LAWRENCE W. BOES

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 74-2282

THOMAS A. VINCEL, GRACE VINCEL, NUNO TARDO, IRENE TARDO, WILLIAM BREEN, VIRGINIA BREEN, JOSEPH RUMMO, ROLF HOEGER, M. D. AIELLO, P. AIELLO, & LIRCO CREDIT CORPORATION,

Plaintiffs-Appellants,

—against—

WHITE MOTOR CORPORATION & GLENN F. KOMMER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (JOHN F. DOOLING, JR., *District Judge*)

BRIEF OF APPELLEES

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Introduction

The United States District Court for the Eastern District of New York (Hon. John F. Dooling, Jr., *District Judge*), ordered on August 23, 1974, that final judgment be entered in this action granting the motion of defendants-appellees, White Motor Corporation and Glenn F. Kommer (hereinafter "White" and "Kommer" or "defendants"), for summary judgment and dismissing this action on the merits (421).* This order was reduced to a final judgment entered by the clerk on August 26, 1974 (424), from which judgment the plaintiffs-appellants, Thomas A. Vincel et al., (hereinafter "plaintiffs"), have taken this appeal (425).

* All references, unless otherwise noted, are to the page numbers of the Appendix filed by plaintiffs-appellants.

The uncontested material facts in this case, derived from the pleadings and extensive discovery proceedings, establish that plaintiff Thomas A. Vincel, through his own fraud and mismanagement, caused the financial demise and bankruptcy of Long Island Diamond Reo Truck Co., Inc. ("L. I. Reo"), of which he was the majority stockholder, president and director.

After Vincel's fraud was first uncovered in 1966, defendant White, the manufacturer and supplier of the truck sold and serviced by L. I. Reo, attempted to save L. I. Reo. The Financing and Voting Trust Agreements between the parties reflected these arrangements. Nevertheless, Vincel as L. I. Reo's president, continued his fraudulent operation of the business. White was then compelled to enforce its liens on L. I. Reo's assets and attempted to recover on L. I. Reo's debts.

Notwithstanding these facts and to defendants' dismay, after years of litigation in the New York courts and the Bankruptcy Court in which White attempted in good faith to settle these controversies, plaintiffs brought this action. However, as District Judge Dooling held, the complaint alleges, if anything, only claims for relief on the part of the corporate bankrupt, L. I. Reo. As plaintiff's brief contends, "[T]he acts complained of . . . involved the assumption by the defendants of control over, and the management of, Long Island Diamond Reo Truck Co., Inc. . . ., followed by defendants causing Long Island Reo to default on certain obligations to White Motor, and using the defaults the defendants themselves had caused as a pretext for *seizing the assets of Long Island Reo,* terminating *its* business, and compelling *its* liquidation." (Brief of Plaintiffs-Appellants, p. 3.) Plaintiffs lack standing either as shareholders or as employees of L. I. Reo to recover individually for the alleged wrongful injury to that corpora-

tion. They have totally failed to show any individual injury or damages separate and apart from their shareholder interests. Moreover, claims of L. I. Reo identical to the ones alleged here were settled by its trustee in bankruptcy pursuant to order and approval of the Bankruptcy Court.

Issues Presented

1. Whether the District Court erred as a matter of law in granting summary judgment in favor of defendants where (a) the plaintiffs, as shareholders, officers, directors and employees of a bankrupt corporation, failed to show individual injury separate and apart from the bankrupt corporation in which they constituted all of the shareholders; (b) the corporation had settled the corporate claims identical to plaintiffs' claims in bankruptcy proceedings; and (c) there is no evidence the corporation would have had net profits distributable to plaintiffs?

2. Whether shareholders, officers and directors of a corporation may assert claims for federal antitrust violations and common law unfair competition and under the federal and New York State Automobile Dealers' Day In Court Acts for injury suffered by the corporate dealer where it has already compromised those claims in bankruptcy proceedings?

3. May shareholders of a corporation assert any claims for injury to the corporation after such claims had been settled by the trustee in bankruptcy of the corporation, pursuant to order of the federal bankruptcy court?

Statement of the Case and Proceedings in the District Court

The action was commenced on June 27, 1969. Plaintiffs' complaint (7) and amended complaint (228) allege six separately stated claims for relief: (1) that defendants violated their contractual duties to plaintiffs under two 1966 agreements; (2) that defendants violated their fiduciary duties to plaintiffs under the same agreements; (3) that defendants coerced plaintiffs into entering into those agreements; (4) that defendants and other officers of White conspired to combine White's three separate truck divisions in 1966 and to drive out of business the dealers of two of its divisions, including L. I. Reo, by unfair competition and other anticompetitive practices; (5) that defendants violated their duty to plaintiffs under the federal Automobile Dealers' Franchise Act (15 U.S.C. §§ 1221-25); and (6) that defendants violated their duty to plaintiffs under a similar New York statute (N. Y. General Business Law § 197).

Upon defendants' motion to dismiss the fourth cause of action (153) and after three years of discovery, Judge Dooling, reviewing the pleadings and the documentary and other undisputed evidence, ordered dismissal of plaintiffs' fourth cause of action. In a comprehensive memorandum and order dated August 2, 1972, summarizing the background of the action, allegations of the complaint, and the basis of his decision granting the motion (154-226), he indicated "that any principle considered dispositive of the motion would necessarily have some application to the other causes of action as well." (194)

Recognizing the force of Judge Dooling's reasoning and seeking to repair the factual and legal defects in their claims, the plaintiffs sought leave to serve an amended

complaint (227); defendants moved for summary judgment on all or part of the remaining causes of action (251). Extensive affidavits and exhibits were submitted as well as the papers already on file (255-385). Briefs were exchanged and extended oral argument held before Judge Dooling, affording plaintiffs' counsel full opportunity to "set forth specific facts showing that there is a genuine issue for trial." (Rule 56(e), Fed. R.Civ. P.) Judge Dooling issued a second memorandum and order on August 23, 1974 (387-423), granting plaintiffs' motion for leave to file the proposed amended complaint (420-21).

Upon defendants' motion for summary judgment as to all or part of the remaining causes of action, Judge Dooling, reviewing all the proceedings to that point including the complaint and amended complaint, the answer and counterclaims, interrogatories and answers thereto, depositions, affidavits and exhibits and the documentary evidence produced, ordered that summary judgment be granted defendants and that plaintiffs take nothing against defendants on the claims for relief set forth in the complaint and amended complaint, and that the plaintiffs' action against defendants be dismissed on the merits. (421). A final judgment was entered by the Clerk on August 26, 1974. (424)

Statement of Undisputed Material Facts

The undisputed material facts in this matter are set forth in detail in the two memoranda of the court below (Hon. John F. Dooling, Jr., *District Judge*) dated August 2, 1972 and August 23, 1974 (pages 154-227 and 386-423, respectively, of the Appendix), as well as in the other papers submitted on the motions and filed in the action. These facts demonstrate the strenuous efforts by defen-

dants to keep L. I. Reo financially solvent and in business; efforts that, unfortunately, failed in their purpose—to save plaintiffs' business from the financial ruin primarily caused by the fraud of plaintiff Vincel.

Plaintiffs repeatedly admitted that L. I. Reo was often and recurrently "out of trust" with respect to trucks whose financing was guaranteed by White and that L. I. Reo and plaintiffs were therefore indebted in substantial sums to defendants White. (157, 176, 415-417, 283-84). Defendants continually gave L. I. Reo and plaintiffs additional time in which they could solve L. I. Reo's serious financial problems. Additionally, White went to the extent of providing L. I. Reo with management assistance as requested by plaintiff Vincel. Despite all this, L. I. Reo was still unable to meet its financial obligations, continued to be "out of trust" on trucks financed by White, and became insolvent. (176, 185-86). In this context plaintiffs attempted to set forth facts before the District Court to infer a conspiracy on the part of defendants to drive L. I. Reo out of business.

Nevertheless, without regard to any factual dispute that might exist as to defendants' intent, Judge Dooling pointed out in both his memoranda and orders that if there were any injury at all it was sustained by L. I. Reo and only indirectly by plaintiffs as a consequence of their relationship to L. I. Reo as its shareholders. Any claim that L. I. Reo may have been able to assert in its own right or that plaintiffs might have asserted through a shareholders' derivative action was settled and released by L. I. Reo's trustee in bankruptcy pursuant to the order of the bankruptcy court. As a result, it is clear that plaintiffs failed to show facts sufficient to bring this action in their own right.

Judge Dooling pointed out the problem with plaintiffs' case in his first memorandum and order:

> "That each act, if actionable at all, was actionable by the corporation *a fortiori* is beyond peradventure. The question raised by this complaint is not with the nature of the act accused or the nature of the damaging aspect, but with identification of the nature of the duty not to afflict the kind of damage involved on the corporation and the identity of those to whom the duty was owed; was the duty owed only to the corporation or was it owed in a legally distinct and separately actionable way to stockholders individually?" (194-95)

Judge Dooling found that the duty, if any, was owed only to L. I. Reo and not the plaintiffs as individuals. In their amended complaint, plaintiffs did not allege any additional facts that would modify the conclusion drawn by Judge Dooling in his first memorandum and order. As he wrote in his second memorandum and order:

> "The new allegations do not advance any allegations of fact not implicit in the original complaint." (401)

The specific uncontested facts upon which Judge Dooling granted summary judgment were fully stated in his two memoranda as follows:

A. The Plaintiffs and L.I. Reo

Plaintiffs constituted 100% of the shareholders of L.I. Reo, a New York corporation incorporated on November 3, 1960. (154, 258) L. I. Reo, and its predecessor, a partnership, including plaintiffs Thomas A. Vincel and Nuno Tardo and another, had been a dealer of Reo trucks since March

1959, then manufactured by the Reo truck division of defendant White. White had already acquired the Reo division effective June 5, 1957, and the Diamond division effective April 1, 1958, dates preceding those on which L. I. Reo's predecessor first became a Reo truck distributor. (156)

From L. I. Reo's formation plaintiff Thomas A. Vincel owned more than half of its voting and non-voting stock and was its president and director. Plaintiffs, Nuno Tardo, L. I. Reo's secretary and parts department manager, and William Breen, its vice president and service department manager, each owned about 15% of the voting stock and approximately 25% and 11%, respectively, of the non-voting stock. The wives of Vincel, Tardo and Breen, also plaintiffs herein, each owned one share of non-voting stock. The other plaintiffs, Joseph Rummo, L. I. Reo's day-shift foreman, Wolfe Hoeger, its night-shift foreman, M. D. Aiello and P. Aiello, one of them a mechanic with L. I. Reo, owned one or two shares each. Lirco Credit Corp., a subsidiary corporation, owned five shares of voting and two shares of non-voting stock. It is undisputed that the individual plaintiffs' employment relations with L. I. Reo were for an indefinite term and terminable at will. (154-55, 258)

B. Relationships Between L.I. Reo and White

Prior to the organization of L. I. Reo, plaintiffs Vincel and Tardo and a third person, doing business as a partnership, signed a temporary distributors contract with the Reo Division of defendant White. That agreement was succeeded about March 18, 1959, by a formal Distributor Selling Agreement. After its incorporation, L. I. Reo signed a Distributor Selling Agreement with the Reo Division on January 3, 1961, effective from December 22,

1960. Under date of March 1, 1963, L. I. Reo signed, effective from January 2, 1963, a Dealer Agreement with defendant White's Reo Motor Division. Under date of February 19, 1965, L. I. Reo entered into a Dealer Selling Agreement dating from December 9, 1964, with Lansing Division of defendant White, which was amended on February 14, 1966, and further amended on June 16, 1967, by instruments executed between L. I. Reo and defendant White's Diamond Reo Truck Division. (155-6, 259)

C. L.I. Reo's Financing Arrangement with C.I.T. and White

L. I. Reo originally financed its purchases of new Reo trucks and used vehicles through Universal C.I.T. Corp. (hereinafter "C.I.T.") pursuant to financing agreements entered into in January 1962 and later in 1964. (156, 259) On December 27, 1962, at the request of L. I. Reo and C.I.T., White agreed to underwrite and guarantee L. I. Reo's financing obligations with C.I.T. (156-7, 259-60) L. I. Reo was to pay C.I.T. the amount of the indebtedness on any truck immediately upon receipt of the proceeds of any sale of C.I.T.-financed trucks. (156-57) C.I.T. would verify that it was being properly paid by conducting occasional surprise "car checks" on L. I. Reo's premises. (260) Defendant White had agreed to take over all of L. I. Reo's paper on demand if L. I. Reo defaulted in its obligations to C.I.T. At all material times in question there was in effect an agreement for wholesale financing between L. I. Reo and C.I.T. dated August 23, 1964. (157)

In addition, defendant White had agreed to finance L. I. Reo's substantial parts business on an open running ledger account. L. I. Reo executed a note dated October 28, 1965, to White in the amount of $54,520.43, covering a portion of the parts account, which in October 1965 had reached $95,000. By November 1966 the indebtedness on the note had been reduced to approximately $18,180. (157, 260)

D. Discovery of L.I. Reo's Default and White's Payment to C.I.T.

In November, 1966, C.I.T. discovered that L. I. Reo had defaulted on its financing agreement. C.I.T. determined through one of its surprise "car checks" that L. I. Reo was seriously "out of trust", that L. I. Reo had sold at least eight trucks to retail customers, but had not paid C.I.T. the amount of the indebtedness due on those trucks. C.I.T. demanded that defendant White honor its guarantee and purchase from C.I.T. all of L. I. Reo's outstanding obligations. White made arrangements with C.I.T. to honor its guarantee. (157-58, 260-61)

The express obligation of defendant White under the December 27, 1962 letter agreement with C.I.T. was that White would purchase the floor-plan obligation covering L. I. Reo's inventory of trucks upon L. I. Reo's default. (157, 261) On the basis of a telephone demand by C.I.T. made upon defendant Kommer, the treasurer of White's Diamond Reo Truck Division, White was compelled to become the assignee of the trust receipts and received the chattel mortgages on all of L. I. Reo's new and used floor-plan trucks under the 1964 financing agreement between L. I. Reo and C.I.T., as well as of the obligations with respect to the vehicles "out of trust." White had to pay C.I.T. $476,850.24. That amount included about $89,780.00 for vehicles "out of trust", $268,653.01 for new floor-plan trucks, and $118,416.50 for used floor-plan trucks. (157-58, 176, 495-96)

At the same time, L. I. Reo's running account with White for parts was in debit balance of about $100,000. Approximately $18,180.00 remained unpaid on the note of October 28, 1965 and somewhat over $90,000.00 was due on L. I. Reo's obligations to C.I.T. taken over by White. L. I. Reo apparently had no source of financing to take the place of C.I.T. other than White. The indebtedness thus actu-

ally due defendant White by L. I. Reo approximated $200,000. (158)

E. White's Oversight of L.I. Reo's Business

At the request of plaintiff Vincel (L. I. Reo's president), and in order to keep L. I. Reo solvent and in operation, White now assumed an active role in the oversight of L. I. Reo's business. (159, 261-2, 415-18) As a result of several meetings held at Vincel's request, in which he was represented by Elliott Lumbard, Esq., it was agreed that White, as owner of the chattel mortgages, security agreements and trust certificates, would not then repossess all of L. I. Reo's inventory, as it had the right to do. Instead, it was agreed that White would render assistance to L. I. Reo by forbearance of demand for the monies owed defendant White, as C.I.T.'s assignee. (159-60, 262)

During the course of these meetings, Vincel admitted that he had been "out of trust" at numerous times by switching vehicle identification plates and thus leading C.I.T.'s inspectors to believe that financed trucks which had been sold had not been sold. (283-85, 311-12, 416) L. I. Reo and plaintiffs Vincel, Tardo and Breen then negotiated and entered into the Financing Agreement of November 23, 1966 and they and others entered into the Voting Trust Agreement under date of December 29, 1966.

F. The Financing and Voting Trust Agreements

The terms of these agreements are discussed in necessary detail in Judge Dooling's first memorandum and order (159-71, 213-17) and need not be repeated here. Essentially, Judge Dooling's thorough examination of the documents (23, 39) led to the conclusion that:

> "[W]hile there are repeated references to the contract relation and trust relation, examination of

> the contract and trust agreement reveals nothing which changes the situation significantly. Very broadly, the understanding of the agreement of November 23, 1966 is primarily and essentially undertakings that run to and not from White." (213)

Given these same facts, Justice Harry Frank of the Supreme Court of the State of New York, New York County, had decided in an action in which L. I. Reo and Vincel were parties, that there was "no merit" in the contention that L. I. Reo or Vincel were coerced into entering into the Financing and Voting Trust Agreements. (321)

G. Events Following the Agreements

In February 1967, before a general manager for L. I. Reo was appointed pursuant to the Financing and Voting Trust Agreements, Vincel issued some $40,000.00 in checks in reduction of the indebtedness for trucks that had been sold. These checks were sent to White and they bounced. (269) Notwithstanding this default under the Financing and Voting Trust Agreements, on or about February 21, 1967, White accepted another note from L. I. Reo and Vincel in the amount of the dishonored checks and a Consignment Agreement and Security Instrument from L. I. Reo. (172, 268-69) The Security Instrument provided that, if L. I. Reo defaulted in the performance of any term of the agreement of November 23, 1966, the note or the security instrument, defendant White was authorized to enter L. I. Reo's premises, take possession of the secured property, and sell it with or without notice at private or at public sale, at either of which defendant White might itself be a purchaser. (174-75, 269)

During this time, defendant Kommer conducted a search for a business manager for L. I. Reo in the New York area.

He approached Ralph Borod, who was Mr. Vincel's independent accountant and a former White branch employee. When Mr. Borod declined the position, he suggested various other persons for the post, one of whom was Samuel Antelis who worked in the same office building in which Borod had his offices. In late January 1967, Antelis agreed to serve as general manager of L. I. Reo commencing February 6, 1967, for a salary of $10,700 per year. Defendant Kommer wrote plaintiff Vincel requesting him to call a meeting of L. I. Reo's board of directors for the purpose of appointing Antelis as general manager of L. I. Reo. Defendant Kommer advised Vincel that Antelis's salary would exceed the $8,400 for which White looked to L. I. Reo for reimbursement. A meeting of the board of directors of L. I. Reo was held on February 6, 1967, with plaintiffs Vincel, Tardo and Breen present. A resolution was adopted by them appointing Antelis general manager and authorizing the corporation's officers to pay $700 a month toward Mr. Antelis's salary, commencing in February 1967. L. I. Reo was, at least in the beginning, billed monthly by White for the $700, but the bills were not paid. Mr. Antelis was *not* and never has been the Regional Representative of White and there is no evidence of that contention despite plaintiffs' statement that such was the fact (171-72, 418-19, 269-70, 376-77, 481). Antelis's only function with respect to White was encompassed within his appointment as L. I. Reo's general manager (481).

The Voting Trust Agreement was terminated in late August 1967, through the resignation of defendant Kommer and the tender back to the depositing shareholders of their stock certificates. White indicated to the shareholders at that time, August 28, 1967, that it did not intend to appoint a successor trustee as of that date (172, 270).

In mid-1967, White had learned to its consternation that despite all its good faith efforts it had been duped. L. I. Reo, still managed in its day-to-day affairs by plaintiffs, its officers and directors, who could not abdicate the responsibility for business which their offices placed upon them, was again seriously "out of trust" on vehicles that had been financed by White. That is, L. I. Reo had not paid White for the vehicles which White had manufactured and shipped to L. I. Reo at L. I. Reo's specific order and which L. I. Reo was obligated to pay for upon sale to customers. It was determined that L. I. Reo had disposed of trucks having an invoice to L. I. Reo from White of about $68,000 without accounting for and paying over the proceeds of sale to White (176-77, 270).

H. Litigation Between L.I. Reo, Plaintiffs and White

Thereupon, White commenced an action in the New York Supreme Court, New York County, on or about August 25, 1967 against L. I. Reo and plaintiff Vincel for breach of their agreement and conversion of the trucks (177). White obtained an order of attachment against the L. I. Reo property upon which White had a lien (270). Under the agreement between L. I. Reo and C.I.T., the note given by L. I. Reo to White in November 1966, and the security instrument dated February 21, 1967, defendant White had the right to take peaceful possession of L. I. Reo's inventory upon the default above described or at any time that White felt its security was in danger (270). The Sheriffs of New York City and Suffolk County replevied, subject to a bond filed by White, approximately three vehicles, which were not on L. I. Reo's premises but at body shops being fitted with special bodies, and also attached L. I. Reo's parts inventory. The balance of the vehicles were removed peaceably and without legal process (270). L. I. Reo moved to vacate the attachment and writ of replevin.

White cross-moved for permission to replevy the attached parts. Mr. Justice Harry Frank denied L. I. Reo's motion and granted defendant White's motion. In that action, L. I. Reo also interposed several counterclaims for damages in the total amount of $2,000,000 (217-18, 270-71). The facts alleged in those counterclaims are substantially identical with plaintiffs' allegations in the present action (177, 217, 315-19).

I. L.I. Reo's Bankruptcy Proceedings

Shortly after Mr. Justice Frank's decision and after the Voting Trust Agreement was terminated, L. I. Reo filed a voluntary petition in bankruptcy in the U.S. District Court for the Eastern District of New York. White then filed its proof of claim in the bankruptcy proceedings. (218, 271). The trustee in bankruptcy counterclaimed alleging that White had driven L. I. Reo out of business. As Judge Dooling found in his close examination of these claims: "The claims sued upon [by plaintiffs] are very plainly precisely those which the trustee in bankruptcy asserted against White and Kommer and settled . . ." (406).

White's claims in the Bankruptcy Court and the trustee in bankruptcy's counterclaims, as well as White's claims in the Supreme Court action against L. I. Reo and L. I. Reo's counterclaims, were settled over plaintiffs' objections with the approval of the bankruptcy referee and upon order of the district court (406). L. I. Reo's trustee in bankruptcy then gave defendant White a general release. White's claims in the Supreme Court action against L. I. Reo, and L. I. Reo's counterclaims were dismissed with prejudice after an order was entered in the Supreme Court action substituting the trustee in bankruptcy for L. I. Reo. Stipulations of discontinuance without prejudice of White's claims against Vincel and Vincel's counterclaims were exchanged. Under this general settlement, L. I. Reo's

estate in bankruptcy received $100,000 from White (271). Thus, L. I. Reo, at first represented by plaintiff's present attorneys and then by counsel for the trustee in bankruptcy, presented claims on its own behalf against White which are indistinguishable from the claims made by plaintiffs. Such claims were settled and released. (217-20, 406-12).

J. Plaintiffs' Failure Even To Establish Corporate Injury

Plaintiff's attempt to impress this Court that L. I. Reo was a thriving business until the advent of the Financing and Voting Trust Agreements in November 1966 and presented gross sales figures from 1961 to 1966 to establish the fact of corporate injury. But plaintiffs could not hide the fact that L. I. Reo was, in reality, not a profitable or growing business. Plaintiffs still do not inform this Court that L. I. Reo's earnings were non-existent and that its creditors were numerous and long standing. An examination of L. I. Reo's original books of entry made by White's accounting staff, as part of the discovery in the district court, established that L. I. Reo suffered a net loss before taxes of $15,571 for the seven-month period ending April 30, 1967, and that the stockholders' equity in that corporation showed a deficit of $39,994 (315). For the seven accounting periods from January 1, 1960 through September 30, 1966, net losses after taxes were shown for five of the seven periods; the aggregate of losses exceeded the gains in two years of profitable operation. (177) According to the balance sheets for the years ending September 30, 1963, 1964, 1965 and 1966, total current liabilities exceeded total current assets each year. (177-78, 407, 415-17).

Many of the allegations that plaintiffs set forth in their brief bear no resemblance to the facts set forth by Judge Dooling in his two memoranda, which painstakingly mar-

shalled the evidence in the record on appeal and Appendix. The practical limitations placed upon the time and attention of this Court limit defendants herein from pointing out how each of the contentions is either not part of the material evidence in this case or is woefully misstated in plaintiffs' brief. From the indisputable facts established by Judge Dooling and set forth in his memoranda as elicited from extensive and probing discovery, it is clear that harm if any, was to L. I. Reo as a corporation and not to the plaintiffs who made up its individual and corporate stockholders. It further shows that those claims, if any, were settled by the Bankruptcy Court and L. I. Reo's trustee in bankruptcy, who represented the corporation as a result of the voluntary petition in bankruptcy which plaintiffs caused to be filed.

From the foregoing, it is clear that there can be no genuine issue that White unlawfully coerced L. I. Reo or any of the plaintiffs to do anything. Rather, the arrangements of November 1966 saved L. I. Reo from immediate insolvency and were entered into at the request of plaintiff Vincel. At that time plaintiffs Vincel and others importuned White to forbear from execution on its valid liens and to allow L. I. Reo, an already insolvent business, a second chance at life. Defendants White and Kommer fell for their pleas and have suffered ever since—through eight years of litigation in the state courts, the federal bankruptcy court and the district court.

ARGUMENT

POINT I

The District Court properly granted summary judgment for defendants, dismissing the action under Rule 56 on the grounds defendants are entitled to judgment as a matter of law and there are no genuine issues as to material facts requiring a trial.

A. Plaintiffs have not demonstrated there are material facts in dispute requiring a trial

Judge Dooling, after thoroughly considering all of the evidence produced herein in a light most favorable to plaintiffs, including all of the pleadings, the affidavit submitted by the parties and exhibits annexed thereto, interrogatories and answers to interrogatories, documentary evidence and depositions, concluded that defendants were entitled to summary judgment as a matter of law. He also concluded that as to the particular facts underlying the legal grounds urged by defendants for summary judgment, there are no genuine issues. These facts demonstrate that plaintiffs, who constituted all of the shareholders of L. I. Reo, established no violations of an individual duty and no individual injury, separate and apart from the duty owed to and injury suffered by their corporation. Nor did plaintiffs even demonstrate the existence of any damages from the alleged corporate injury, since L. I. Reo had been an ailing enterprise in desperate financial difficulty even before the discovery of plaintiff Vincel's fraudulent conduct in 1966.

Plaintiffs are requesting a trial in this action; however, they do not substantiate any material facts which they claim are in genuine dispute. Instead, plaintiffs reallege in conclusory language the same charges made in

their complaint, such as conspiracy, breach of contract and violation of fiduciary duty. Plaintiffs do not actually contest the undisputed facts as outlined in Judge Dooling's memoranda. Rather, they disagree with the conclusions of law inevitably derived from the evidence;—thev continue to urge claims on behalf of the corporation, L. I. Reo, and not claims of the plaintiffs individually. Apart from the fact that plaintiffs' allegations constitute merely erroneous legal conclusions drawn from the evidence, plaintiffs do not shed any light on the facts of the alleged conspiracy or separate fiduciary obligations allegedly owed to plaintiffs by defendants. Thus, plaintiffs' demand for a trial is misplaced. The material facts set forth in Judge Dooling's memoranda stand undisputed before this Court.

Plaintiffs' obligation to come forward with specific facts to support their allegations is emphatically established by subdivision (e) of Rule 56 of the Federal Rules of Civil Procedure:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

As to plaintiffs' charge of conspiracy, an allegation of a particularly ambiguous nature, plaintiffs must show facts placing defendant among the conspirators and acting with them by explicit or implied agreement to accomplish an unlawful result by lawful means, or a lawful result by unlawful means. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465, 65 L.Ed. 349 (1920); *Pettibone* v. *United*

States, 148 U.S. 197, 203, 37 L.Ed. 418 (1893). Where plaintiffs are unable to produce "significant probative evidence" supporting their allegations that defendant was a participant in an alleged conspiracy, summary judgment in favor of defendant will be granted. *First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 287-90, 20 L.Ed. 2d 569, 591-2 (1968). Plaintiffs have not produced any such facts.

During the period of this litigation, the parties have made full use of discovery procedures. Nevertheless, plaintiffs have failed in their efforts to elicit material evidence favorable to their viewpoint or even to show any genuine dispute of a material fact. In applying the guidelines established by Rule 56 and construing the evidence most favorably on behalf of plaintiffs, it must be concluded that summary judgment in favor of defendants was properly granted by the court below. Plaintiffs cannot escape summary judgment on the mere hope that something will turn up at trial. *Ayers* v. *Pastime Amusement Co.,* 283 F.Supp. 773, 793 (D.S.C. 1968).

B. Plaintiffs lack standing as shareholders to assert the claims of their corporation and to recover directly as individuals for the alleged wrongful injury to that corporation

As to the plaintiffs' interest as L I. Reo's shareholders, where the injury is suffered by the corporation and the shareholders suffer solely through diminution in the value of their stock, the shareholders are wholly compensated when the corporation is made whole. In this way, the shareholders will have regained the lost value of their corporate stock by the replenishment to the corporation of that which they lost.

The affidavit of plaintiff Vincel, submitted in response to defendants' summary judgment motion, illustrates this

conclusion. He claims it was not he and the other plaintiffs who brought L. I. Reo down; rather, it was the mismanagement of L. I. Reo by defendants White and Kommer. Nevertheless, the duties allegedly violated and injury suffered by L. I. Reo are entirely commensurate with the claimed violations and injuries suffered by plaintiffs. Mismanagement certainly states a claim on behalf of L. I. Reo against defendants (although the facts show otherwise), but even gross incompetence of business affairs would not state a distinct claim for shareholders separate and apart from the claim of the corporation.

L. I. Reo, of course, had no right to be "out of trust." The enforcement of White's valid lien against L. I. Reo's assets, whether or not justified, injured L.I. Reo as a corporation. The alleged threats, coercion or other pressure to put L. I. Reo out of business were still only threats, coercion and pressure directed to injure L. I. Reo and not plaintiffs as individuals. The terms of the Voting Trust Agreement were clearly not violated by the enforcement of the lien. The purported ineptitude or thievery of Antelis, the business manager appointed by plaintiffs in their capacity as direcors of the corporation (and whose appointment was recommended to them and defendant Kommer by L.I. Reo's accountant) injured the business of L. I Reo and not plaintiffs as individuals. The alleged continuous drain on L. I. Reo's cash and capital did not injure plaintiffs separate and apart from their status as shareholders of L. I. Reo. Struggle as they might in a web of facts and corporate structures of their own creation, plaintiffs cannot state a claim for injury to themselves as individuals. All that they can possibly state are alleged actions of defendants in violation of duties allegedly owed to and injuries suffered by L. I. Reo.

The law to be applied to this case is nearly universally accepted. Judge Dooling, in his first memorandum and order, stated the rule recognized by the long line of cases of the New York courts:

> "The primary rule is that for an injury to a corporation only the corporation may sue, either in its own name, or derivatively through an action commenced in the name of a shareholder who joins the corporation as a defendant. In New York the leading case is *Niles* v. *N.Y.C. & H.R.R.R.*, 1903, 176 N.Y. 119, 123-124. The principle is applied to insolvent corporations for which a receiver has been appointed, *Potter* v. *Sabin*, 1893, 149 U.S. 473, the right of action in such case vesting in the receiver or trustee and remaining subject to the administration of the insolvency court. *Cf. McCandles* v. *Furland*, 1935, 296 U.S. 140, 160-161, 163; *Pepper* v. *Litton*, 1939, 308 U.S. 295; 306-307; *Bayliss* v. *Rood*, 4th Cir. 1970, 424 F.2d 142, 146." (195)

Plaintiffs rely primarily on *Ritchie* v. *McMullen*, 79 Fed. 522 (6th Cir. 1897), an apparent though questionable exception to the rule in *Niles*, and a line of several cases purportedly following *Ritchie*. Judge Dooling's scholarly and comprehensive investigation and examination of plaintiffs' argument from these cases appears in his first memorandum and order, at pages 195 to 220 of the Appendix. He held the *Ritchie* exception inapplicable. In fact, Judge Dooling commented that analysis of the cases shows that "all reason for defining an exception from the rule of *Niles* disappears." (207)

In *Ritchie*, for example, the court agreed that if the wrongs charged to the defendants were purely wrongs committed in the defendants' roles as officers-directors

(such as negligent management or ill-advised acts including ill-advised or negligent voting of their own stock), plaintiff stockholder would not have had an individual action for the diminution in value of his stock. Liability, the court pointed out, arose from the defendants' use of their corporate positions intentionally to diminish the value of plaintiff's stock, which they held in pledge, in order to obtain the stock at a foreclosure sale. Such conduct inflicted injury directly upon plaintiff by defendants. While plaintiff was not successful on the merits, it should be noted that had plaintiff recovered directly, the effect would have been to avoid restoring assets to the corporation in which defendants also would share. Here, of course, defendants White and Kommer had no such equity interest in L. I. Reo. Nor do the facts show any lawfully compensable injury, intentional or otherwise, inflicted directly upon plaintiffs in any measure different from that allegedly suffered by L. I. Reo.

Similarly, in *Von Au* v. *Magenheimer,* 126 App. Div. 257, 110 N.Y. Supp. 629 (2d Dept. 1908), *aff'd,* 196 N.Y. 510, 89 N.E. 1095 (1909), plaintiff would have been left without a remedy if only the corporation could recover for the diminished value of the stock, since defendants controlled such corporation and plaintiff had been the victim of a classic "freeze out." Here, plaintiffs were never frozen out of L. I. Reo; indeed they continued to run its day-to-day affairs with the assistance and supervision of defendants White and Kommer, retained control of their stock following Kommer's resignation as voting trustee and directed the filing of L. I. Reo's petition in bankruptcy.

An important factor in the decision in *General Rubber Company* v. *Benedict,* 215 N.Y. 18, 109 N.E. 96 (1915), was that since the stockholder there was seeking recovery for diminution in the value of its stock any recovery by the

corporation itself would have to be adjusted to avoid double recovery. In the present case, L. I. Reo has, through its trustee in bankruptcy, fully settled its claims for injury to its business. As Judge Dooling explained:

> "Judge Cordozo's analysis inevitably and inescapably identifies the primary locus of the right of action as a right to reparation for damages in the corporation, and, as lodged in the corporation, eliminates from the supposed diminution in value of any complaining stockholder's stock his ratable indirect interest in the corporation's right of recovery. There can be no race of diligence between the complaining shareholder and the corporation to see which recovers first. The complaining shareholder may not recover an unreal diminution in value simply because the corporation had not sued promptly or effectively, nor gather to himself a recovery which, if made by the corporation, would have been distributable to those having interest in the corporation senior to those of the complaining stockholders." (206-07.)

In *Matter of Auditore,* 249 N.Y. 335, 164 N.E. 242 (1928), the direct action permitted on behalf of the stockholder afforded a recovery under circumstances in which one-half of any corporate recovery would have inured to the benefit of the wrongdoer himself. Double recovery was avoided by having damages reflect the loss of value of the stock held only by plaintiff. Similarly in *Perlman* v. *Feldman,* 219 F.2d 173 (2d Cir. 1955), direct relief in those circumstances expressed an economy in the form of equitable relief. *Blakeslee* v. *Sottile,* 118 Misc. 513, 194 N.Y.S. 752 (Sup. Ct. N.Y. Co. 1922) is similar to *Auditore. Kono* v. *Roeth,* 237 App. Div. 252, 260 N.Y.S. 662 (1st Dept. 1932) and *Cutler* v. *Fitch,* 231 App. Div. 8, 246 N.Y.S. 28 (4th

Dept. 1930) are pledgor-pledgee cases similar to *Ritchie. Meyerson* v. *Franklin Knitting Mills,* 185 App. Div. 458, 172 N.Y.S. 773 (1st Dept. 1918), is only superficially an action concerning the seeking of recovery by a sole stockholder but is in actuality a direct action on a contract breached by failure to deliver knit fabrics.

Here, while plaintiffs point to the written agreements among themselves, L. I. Reo and defendants, the violations of legal duty and the injury claimed essentially derive from their status as shareholders of the corporation and only because of injury allegedly suffered directly by the corporation. The charge is that defendants were responsible for the mismanagement of the corporation. As Judge Dooling pointed out, as a consequence "[t]otal redress of the wrongs here alleged would be most readily and directly accomplished by a recovery on behalf of L. I. Reo and in its name. That would restore to each stockholder the whole of his right." (217) Since such claims have been settled by the corporation's trustee in bankruptcy, no derivative claim can be made.

> "Any action maintainable by all of the stockholders suing together to redress a wrong actionable by the corporation because the damage impact of the alleged wrongful acts fell upon it would be legally identical with the corporation's own action. It is such actions that the principle of *Niles* explicitly forbids." (220) (See Point III, *infra.*)

The one additional case that plaintiffs now mention in the brief on appeal and not brought to the attention of the lower court does not change the validity of its conclusions.*

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* In *Buschmann* v. *Professional Men's Ass'n,* 405 F.2d 659 (7th Cir. 1969), the court reversed the dismissal of a complaint

(footnote continued on following page)

C. Plaintiffs have no claims against defendants for loss of employment

Plaintiffs argued in the District Court that because six of their number were officers or other employees of L. I. Reo, their injury is other than that solely as shareholders and therefore they may recover for their lost employment opportunities. The law is otherwise, as held by Judge Dooling. (404)

1. *The agreements among plaintiffs, L.I. Reo, and defendants do not contractually protect plaintiffs' employment*

Plaintiffs allege that their claims arise out of agreements between defendants, L. I. Reo and themselves. Yet such agreements do not protect plaintiffs' employment relations with L. I. Reo "in any way." (404) Nowhere is it alleged that the employees of L. I. Reo were the intended beneficiaries of the agreements nor can this essential fact be derived from the evidence. Detailed examination of the agreements show that they conferred no benefit on the employees of L. I. Reo even though the signatories were employees.

In fact, as Judge Dooling found, the "undertakings of the [financing] agreement of November 23, 1966, are primarily and essentially undertakings that run to and not from White." (213) Furthermore, Judge Dooling has held,

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on the ground it failed to state a cause of action. The complaint alleged breach of specific and implied terms of a contract for the benefit of the complaining stockholder of the corporation. Here, however, the uncontested material facts produced by extensive discovery proceedings show no breach by defendants of any duty or other obligation owed by defendants to plaintiffs as individuals. In addition, in *Buschmann* the damages sought to be recovered were not the result of losses sustained by the corporation and could not have been asserted by the corporation. Here, of course, the claims of plaintiffs are identical with the claims asserted and settled by L. I. Reo in the state court and bankruptcy proceedings.

"if White and Kommer are not liable to [plaintiffs] as stockholders *qua* stockholders—their only arguably meaningful contractual or trust relationship with White and Kommer under the November 23, 1966 Agreement and the Voting Trust Agreement—they can scarcely be liable to them as being salaried employees in respect of their salary interest. Nothing in either agreement bears on the subject in any way." (404)

On the other hand, the agreements were very specific and detailed in protecting other rights. Specifically, the shareholders agreed in paragraph 12 of the Financing Agreement that as long as the notes of $54,000 and $195,000 (provided for in Paragraphs 5 and 6, respectively, of that agreement) (28-29, 33) were even partially unpaid, the shareholders could not, directly or indirectly, in any manner engage in any business competitive with L. I. Reo or its affiliates in the greater New York metropolitan area. Only one possible conclusion can be drawn from this provision: it was contemplated that the signatory shareholders might at some future date be engaged in businesses other than those competitive with L. I. Reo in the prescribed area. As a result, it is clear that plaintiffs and defendants themselves in no way considered plaintiffs' possible status as employees of L. I. Reo to be protected by the Financing or Voting Trust Agreements.

Moreover, each of the agreements contained an integration clause (paragraph 14(c) of the Finance Agreement and paragraph 19(b) of the Voting Trust Agreement (34, 49)) which recited that the instrument contained the entire agreement of the parties and that it was not to be changed or modified except by a writing signed by all the parties. Hence, by its terms, the agreements contained all the rights agreed to between the parties and these did not include protection for plaintiffs as L. I. Reo's employees.

The rule in such cases is well settled. A party to a contract will not be permitted to show a prior or contemporaneous understanding or representation at variance with an unambiguous and apparently complete written contract that contains a stipulation to the effect that only conditions incorporated therein shall be binding: *Fogelson* v. *Rackfay Constr. Co.*, 300 N.Y. 334, 90 N.E. 2d 881 (1950); *Broderick Haulage Co.* v. *Mack International M.T. Corp.*, 1 A.D. 2d 649, 153 N.Y.S. 2d 127 (1st Dept. 1956); *Vinciguerra* v. *New York*, 38 A.D. 2d 607, 326 N.Y.S. 2d 293 (3d Dept. 1971). And where a written instrument contains a provision to the effect that it cannot be changed orally it cannot be modified unless the modification is in writing and signed by the party against whom enforcement of the change is sought. (N.Y. Gen. Obl. Law § 15-301.)

2. *Plaintiffs have no claim for tortious interference with their employment*

As far as the pleadings and evidence indicate, the employment by L. I. Reo of six of the plaintiffs was terminable at will. Plaintiffs did not come forward with any employment contract for a particular term for any one of the plaintiffs. Since their employment could end at any time, no legal injury was suffered by plaintiffs-employees when they caused L. I. Reo to file for voluntary bankruptcy. It should be noted that three of these same plaintiffs, as officers and directors of L. I. Reo, voted for and directed L. I. Reo to file the bankruptcy petition.

New York law is certain that for an employee to maintain a suit for tortious interference with his employment contract, he must show four elements: (1) the existence of a valid contract between himself and his employer; (2) the defendant's knowledge of that contract; (3) that defendant's acts were intentionally and purposely aimed at

breaching the employee's particular contract; and (4) damages. *Israel* v. *Wood Dolson Co.,* 1 N.Y. 2d 116, 120, 151 N.Y.S. 2d 1, 4 (1956). All four elements are lacking in plaintiffs' case. See also *Terry* v. *Dairymen's League Co-op. Ass'n,* 2 A.D. 2d 494, 497, 157 N.Y.S. 2d 71, 76 (3d Dep't 1956); *Van Wyck* v. *Mannino,* 256 App. Div. 256, 258, 9 N.Y.S. 2d 684, 687 (2d Dep't 1939).

Moreover, plaintiffs themselves alleged and sought to disprove the opposite from the requisite intent on the part of defendants to interfere purposely with their employment. In *Reale* v. *International Business Machines Corp.,* 34 A.D. 2d 936, 937, 311 N.Y.S. 2d 767, 768 (1st Dept. 1970), *aff'd,* 28 N.Y. 2d 912, 322 N.Y.S. 2d 735 (1971), the plaintiff alleged that he was maliciously and wrongfully terminated from his job as a salesman for IBM by the actions of defendants. But plaintiff did not have an employment contract for any particular term and could not "demonstrate an exclusive malicious motivation for the acts of defendants." The court held that plaintiff "was bound to present proofs tending to exclude any motive other than a desire on the part of defendants to cause harm to plaintiff." Or, in the words of Justice Holmes, defendants must be motivated and act out of "disinterested malevolence." *American Bank and Trust Co.* v. *Federal Reserve Bank,* 256 U.S. 350, 358, 65 L.Ed. 893, 990 (1921). See also *American Broadcasting Co.* v. *Brandt,* 56 Misc. 2d 198, 202, 287 N.Y.S. 2d 719, 723, (Sup. Ct. N.Y. Co. 1968) *aff'd,* 293 N.Y.S. 2d 988 (1st Dept. 1968).

In the instant case, plaintiffs make no attempt to claim that defendants were motivated solely by the desire to damage plaintiffs as employees. After all, plaintiffs' allegations would have it that defendants acted to put L. I. Reo out of business, violate the federal anti-trust laws, damage plaintiffs as shareholders, etc. No evidence has

been or could be produced showing any intent to injure plaintiffs as employees, or a particular singleminded effort by defendants to interfere with plaintiffs' right as officers and employees of L. I. Reo. Indeed, it would be fantastical to claim that defendants, in allegedly driving L. I. Reo out of business, intended with "disinterested malevolence" to injure the individual plaintiffs, not as L. I. Reo's shareholders, but rather as its employees.

D. Plaintiffs have no claim that any agreements among themselves, L.I. Reo and defendants were violated.

1. *Defendants did not cause the dissolution or liquidation of the corporation: plaintiffs put the corporation into bankruptcy.*

Plaintiffs also claim that defendants violated their contractual and fiduciary obligations by causing the dissolution or liquidation of L. I. Reo. In fact, plaintiffs' only specific allegation that defendants violated a definite obligation to them is the alleged violation of paragraph 4 of the Voting Trust Agreement. This provision provided that:

> "The Trustee agrees that during the term of this Agreement, he will not cause any of the corporations to be dissolved or totally or partially liquidated without having received the prior written consent of the signatories." (42)

It is clear that defendants did nothing, directly or indirectly, to violate this provision.

Plaintiffs apparently refer to filing of the voluntary petition in bankruptcy of L. I. Reo after the Voting Trust Agreement was terminated as being the result of forbidden acts taken by the trustee, defendant Kommer. It is evident that the trustee Kommer did not put the corporation into bankruptcy but rather it was the plaintiffs, as directors and officers of L. I. Reo, without prompt-

ing or urging by defendants and, in fact, with the intention of undercutting defendants' action against L. I. Reo in the New York courts, who approved and adopted the appropriate corporate resolutions and filed the required bankruptcy petition.

Judge Dooling found that plaintiffs' claim in this regard could not stand up in the clear light of his examination:

> "The allegations that defendants caused the dissolution and liquidation and the reference to Section 4 of the Voting Trust Agreement add nothing. Since it is undeniable that, as Mr. Vincel explains in his answering affidavit, paragraph 39 [300], L. I. Reo filed a petition of voluntary bankruptcy on December 21, 1967, after the termination of the Voting Trust (see Memorandum of August 2, 1972, p. 20 [172]), Section 4 of the Voting Trust Agreement is not relevant to plaintiffs' claims. It self-evidently means that the Voting Trustee will not without written consent of the depositing stockholders use his right to vote the deposited stock to bring about the dissolution of the corporation or a distribution of its assets to its stockholders by voting a complete or partial liquidation. That is made clear by the second sentence of Section 4 which assumes that in any such dissolution or complete or partial liquidation as Section 4 deals with the Voting Trustee as record owner of the stock would receive the corporate assets of which, of course, the Voting Trust Certificate holders would be the beneficial owners. Section 4, that is, simply sets forth a restriction on the Voting Trustee's right to vote the stock of which he was the record owner; that right is broadly given by Section 6. (Parenthetically, in Section 10 of the Voting Trust Agree-

ment, the shareholders signing the Agreement or later consenting to it agreed that during the term of the Agreement, they would not take steps to file a petition in bankruptcy 'against' L. I. Reo or a petition to request any court to take any other action for the relief of debtors or benefit of creditors.)

"It does not appear that Kommer as Trustee had any occasion to or did vote the stock of L. I. Reo." (401-02)

Thus, even if the alleged conspiratorial mismanagement of L. I. Reo by defendants caused the corporation to become insolvent, this would not violate the prohibition of corporate dissolution or liquidation in the Voting Trust Agreement. Bankruptcy and dissolution or liquidation are distinct and separate legal events well known to the attorneys for plaintiffs and defendants who drafted these agreements.

Articles 9 and 10 of the New York Business Corporation Law provide for the orderly termination of corporate existence through the dissolution and liquidation of corporations. Corporations as creatures of the State may only be formed and dissolved in accordance with the State statutes. Unless the procedures set forth in Article 9 and 10 of the BCL are followed, dissolution is not possible. *Hitch* v. *Hawley,* 132 N.Y. 212, 30 N.E. 401 (1892); *In re Directors of Binghampton Gen. Elec. Co.,* 143 N.Y. 261, 38 N.E. 297 (1894); *In re Dolgeville Elec. L. & P. Co.,* 160 N.Y. 500, 55 N.E. 287 (1899). In *Matter of Coleman,* 174 N.Y. 373, 382, 66 N.E. 983, 986 (1903), the Court of Appeals said that "the proceedings to dissolve a corporation, either voluntary or involuntary, rest wholly upon the provisions of the statute." See also, *In re Clark's Will,* 257 N.Y. 487,

491, 178 N.E. 766, 767 (1931); *Knickerbocker Trust Co.* v. *Terrytown W.D.T.M. Ry.*, 133 App. Div. 285, 288, 117 N.Y.S. 871, 873 (2d Dept., 1909); *In re Malcolm Brewing Co.*, 78 App. Div. 592, 593, 79 N.Y.S. 1057, 1058 (2d Dept. 1903); *In re Lenox Corp.*, 57 App. Div. 515, 518, 68 N.Y.S. 103, 105 (4th Dept. 1901); *In re Simonds Mfg. Co.*, 39 App. Div. 576, 579, 57 N.Y.S. 776, 778 (1st Dept. 1899).

While dissolution is a State statutory procedure, bankruptcy is exclusively federal in nature with a specific meaning under the federal statutes. *Perez* v. *Campbell*, 402 U.S. 637, 29 L.Ed. 2d 233 (1971); *Gardner* v. *New Jersey*, 329 U.S. 565, 91 L.Ed. 504 (1946); *California State Board of Equalization* v. *Goggin*, 245 F.2d 44 (9th Cir. 1957), *cert. denied*, 353 U.S. 901, 1 L.Ed. 910 (1957). Furthermore, while the dissolution of a corporation results in the termination of its existence as a legal entity, bankruptcy itself does not terminate corporate existence. *People* v. *Troy Chem. Co.*, 118 App. Div. 437, 104 N.Y.S. 22 (3d Dept. 1907); *Application of Gail Kiddie Clothes*, 56 N.Y.S. 2d 117 (Sup. Ct. Orange Co. 1946); *In re Carlton Crescent, Inc.*, 80 F. Supp. 822 (S.D.N.Y 1948), *aff'd.*, 173 F.2d 944 (2d Cir. 1949), *aff'd.*, 388 U.S. 304, 90 L.Ed. 107 (1949); *In re Theobald-Jamsen Electric Co.* v. *Harry I. Wood Elec. Co.*, 285 Fed. 29, 30 (6th Cir. 1922); *In re Southern Motor Lines*, 129 F. Supp. 374, 376 (S.D. Tex. 1955); 12 N.Y. Jur., *Corporations* § 918 (1971); 9 Am.Jur.2d, *Bankruptcy* § 268 (1963).

Bankruptcy and dissolution or liquidation are therefore distinct legal events. *Mosaic Tile Co.* v. *Stabe Corp.*, 323 F.2d 274 (2d Cir. 1963). *In re Joseph Feld & Co.*, 38 F.Supp. 506 (D. N.J., 1941), concerned an action by stockholders to invalidate a bankruptcy commenced by voluntary petition authorized by its board of

directors. The stockholders argued that such a petition could not be filed on behalf of the corporation in the absence of express authorization by the stockholders since bankruptcy was the equivalent of dissolution which under state law requires a stockholder vote. However, the court disagreed, holding that "a voluntary bankruptcy is not equivalent to a statutory dissolution, and the right of directors to authorize bankruptcy is not inconsistent with the right of the stockholders to authorize dissolution." (38 F.Supp. at 507.)

This distinction was recognized by the parties to the agreements. When they wished to provide against the filing of a petition in bankruptcy or reorganization on behalf of L. I. Reo, they did so in specific terms. Paragraph 10 of the Voting Trust Agreement prohibits shareholders from taking such action during the term of the Agreement. It is, therefore, evident that Section 4 of the Voting Trust Agreement was intended to forbid the Voting Trustee from voting to dissolve or liquidate L. I. Reo pursuant to Articles 9 and 10 of the New York Business Corporation Law without the specific written consent of the shareholders. No such vote was ever taken, nor did the board of directors, who were the plaintiffs, ever authorize such action. As a result, there was no breach of the Voting Trust Agreement in this respect or in any other respect.

In any event, the provision did not apply to the enforcement by White of a valid lien upon L. I. Reo's property, which lien was made possible by the Financing Agreement and the Voting Trust Agreement. Plaintiffs argue, however, that the arrangements into which they entered contained contradictory obligations. It is plaintiffs' counsel who urges this Court to construe those agreements so as to be self-contradictory.

2. *Plaintiffs failed to produce any facts to support allegations of willful misfeasance and gross negligence in violation of the agreements.*

As to plaintiffs' allegations of willful misfeasance and gross negligence on the part of defendants in violation of the agreements, Judge Dooling found that these had no factual basis and, in any event, did not allege wrongs against plaintiffs as individuals:

> "The explicit reference to the willful misfeasance and gross negligence language of Section 14 of the Voting Trust Agreement adds nothing to the original complaint. Paragraph 37 of the original complaint alleged willful misfeasance and gross negligence, as does paragraph 43 of the new complaint, which then adds 'as those terms are used in the Voting Trust Agreement.' But in any event Section 14 of the Agreement does not supply a basis of liability. It is an exculpatory clause, and it halts its exculpation, as is usual, short of 'willful misfeasance or gross negligence.' Section 14 operates where, independent of it, a liability on the Trustee's part would exist, and it exculpates the Trustee unless he has been willfully misfeasant or grossly negligent. But the foundation of the Trustee's liability must be found elsewhere, not in Section 14." (402-03)
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> * * *
>
> "Similarly the misfeasance and negligence language of Section 14 is not the generating source of rights in plaintiffs or in L. I. Reo. In the first place, Section 14 could not exculpate Kommer except for his misconduct as trustee, and no breach of a specific trustee duty is charged. Rather, Kommer's alleged misdeeds were as an oppressive creditor,

and as a conspirator with White (his employer), not because at any stockholders' meetings he cast votes that he knew would injure an individual interest of the stockholders, as by voting to issue sufficient stock to reduce the depository stockholders to a minority, or by selling the deposited shares to a purchaser for value without notice.

"The critical and irremediable defect remains the inescapable nature of the alleged wrong and damage. The alleged wrongful acts were related to the conduct of the L. I. Reo business, allegedly ruined that business and only in that way damaged plaintiffs through their ownership interest in the business. The breaches of duty are not breaches of any duties undertaken in either of the agreements relied upon but allegedly rapacious acts as a creditor insisting on the letter of its bond and taking advantage of non-existent or insubstantial defaults." (405-06)

POINT II

Plaintiffs lack standing to assert claims under the federal and state antitrust laws and automobile dealers statutes.

A. Plaintiff shareholders lack standing to assert claims under the federal anti-trust laws and for unfair competition.

Plaintiffs' fourth cause of action apparently alleges claims for relief under the federal or state antitrust laws. (Brief of plaintiffs-appellants, p. 2). In his first memorandum and order, Judge Dooling dismissed the fourth cause of action primarily on the ground that such claims, if any, could be asserted only by the corporation and not by its stockholders.

"It may be accurate to say that the wrong (if any) done to L. I. Reo by the kind of act alleged in

the fourth cause of action is peculiarly an injury to the corporation and only derivatively to its shareholders, but the same thing can be said of substantially every other act complained of in the first four causes of action." (194)

It is clear that a cause of action for unfair competition and destruction of the corporation's business does not belong under New York or federal law to the stockholders but is corporate and derivative in nature. See *Dior* v. *Milton,* 9 Misc. 2d 425, 155 N.Y.S. 2d 443 (Sup. Ct. N.Y. Co. 1966), *aff'd.* 2 A.D. 2d 878, 156 N.Y.S. 2d 996 (1st Dept. 1956); *Green* v. *Victor Talking Mach. Co.,* 24 F. 2d 378 (2d Cir. 1928), *cert. denied,* 278 U.S. 602, 73 L.Ed. 530 (1928); *Loeb* v. *Eastman Kodak Co.,* 183 F. 704 (3d Cir. 1910); *Mullins* v. *First Nat'l. Exch. Bank,* 275 F. Supp. 712 (W.D. Va. 1967); *Ames* v. *American Tel. & Tel. Co.,* 166 Fed. 820 (C.C.D. Mass 1909).

Furthermore, it has been universally held that one or all of a corporation's stockholders may not bring an action in their own right for antitrust violations causing corporate injury. *E.g., Schaffer* v. *Universal Rundle Corp.,* 397 F. 2d 893, 896 (5th Cir. 1968); *Ash* v. *International Business Mach. Inc.,* 353 F. 2d 491, 493-4 (3rd Cir. 1965), *cert. denied,* 384 U.S. 927 16 L.Ed. 531 (1966); *Walker Distrib. Co.* v. *Lucky Lager Brewing Co.,* 323 F. 2d 1, 10 (9th Cir. 1963), *cert. denied,* 385 U.S. 976 17 L.Ed. 680 (1966); *Bookout* v. *Schine Chain Theatres, Inc.,* 253 F. 2d 292 (2d Cir. 1958) (Hand, C.J.); *Ames* v. *American Tel. & Tel. Co.,* 166 Fed. 820 (C.C.D. Mass. 1909).

In perhaps the first case in which this issue arose under the antitrust laws after the passage of the Sherman Act in 1890 (26 Stat. 209), *Ames* v. *American Tel. & Tel. Co., supra,* the plaintiff, a stockholder of an independent tele-

phone company, alleged that defendant AT&T secured control of the independent company by purchasing its stock for the purpose of monopolizing commerce in interstate telephone traffic and so mismanaged the company as to put it into receivership.

The court held that a stockholder could not allege a private cause of action under the statute in his own behalf, stating that, "There can be little doubt that the ordinary principle of representation of the stockholders by the corporation is as applicable to a violation of the Sherman Act as to any other violation of law." (166 Fed. at 822). The court reasoned:

> "The corporation has a right of action, and to so interpret the act as to confer a right of action upon the stockholder, . . . would be in effect to subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act." (166 Fed. at 823).

The court pointed out that the corporation allegedly injured was in receivership and that any recovery by the action of its stockholders "would result in depriving creditors of the corporation, if there are any, of the assets that properly belong to them." (*Ibid.*)

Thus, to the extent plaintiffs have asserted claims under the federal or state antitrust law, they are not able to maintain the claim for relief on their own behalf for alleged damages to their interest as corporate stockholders.

B. Plaintiff shareholders lack standing to assert claims under the federal and New York Automobile Dealers' Day in Court Acts.

Plaintiffs in their fifth and sixth causes of action attempt to state claims under federal and state automobile dealer protection statutes. However, these claims have al-

ready been asserted and determined by the automobile dealer entitled to protection—that is, L. I. Reo itself (see Point III below)—and, in addition, plaintiffs are not entitled to the protection of either Act. Judge Dooling concurred in this conclusion. (412-14)

1. *The federal act*

The Automobile Dealer's Franchise or Day in Court Act, 15 U.S.C. §§ 1221-1225, permits motor vehicle dealers to bring actions against motor vehicle manufacturers for arbitrary terminations of a dealer's franchise. (15 U.S.C. § 1222.) An "automobile dealer" is defined as "any person . . . corporation, or other form of business enterprise . . . operating under the terms of a franchise and engaged in the sale or distribution of . . . trucks."

Plaintiffs, even as 100% of L. I. Reo's shareholders, are not an "automobile dealer" as so definied. White's franchise (the Distribution Selling Agreement) was with the corporation, L. I. Reo. None of the plaintiffs were party to the franchise and none of the plaintiffs were in any way named or assumed obligations thereunder. Plaintiffs admit as much when they charge in paragraph 56 of their amended complaint that defendants "cancelled the aforementioned franchise of L. I. Reo . . ." (246) The statute confers standing to the person "operating under the terms of a franchise" agreement. Under the facts of this case, such person was only L. I. Reo and not any of the plaintiffs.

As shown below, L. I. Reo previously brought and settled such an action with defendants in the bankruptcy court. These claims cannot be relitigated by the shareholders, officers or employees of the corporate franchisee.

2. *The state act*

The New York statute is similar to the federal statute. It prohibits a motor vehicle manufacturer, among other things, from "terminat[ing] any contract, agreement, or understanding or renewal thereof for the sale of new motor vehicles to a . . . dealer . . . except for cause." (N.Y. Gen. Bus. Law § 197). The Act defines "dealer" as "any person or corporation selling . . . one or more vehicles under a retail agreement with a manufacturer. . ." As is alleged by plaintiffs in paragraph 60 of their amended complaint, the franchise agreement ran between White and L. I. Reo. (247) Plaintiffs were not parties to the agreement. While other agreements between defendant White and plaintiffs are alleged, plaintiffs do not, and cannot, characterize them as being retail agreements for the sale of motor vehicles. Since plaintiffs did not have such an agreement with defendant White they are not "dealers" within the definition of that term.

Furthermore, even if the state law could be construed to protect plaintiffs directly, state law is directly limited by the federal statute. Federal law supersedes the state law where there is a direct conflict between the "express provision" of the federal and state laws "which cannot be reconciled." (15 U.S.C. § 1225) In any event, the New York statute has been found to be narrower in scope than the federal statute. *Wagner* v. *World Wide Auto Corp.*, 201 F. Supp. 22, 24 (W.D.N.Y. 1961). Hence, since the plaintiffs herein are denied standing to sue under the federal act, by reason of an "express provision", i.e., the definition of "automobile dealer", the New York statute's express provisions should be similarly construed to deny plaintiffs' standing to sue.

3. *L.I. Reo, the holder of a White dealer's franchise, settled its claim and the statutes cannot authorize double recovery by its shareholders.*

Several cases give individual principals of corporate dealerships the right to assert claims as "automobile dealers" where it was evident the corporation was only a nominal party to a franchise agreement. *Lewis* v. *Chrysler Motor Corp.*, 456 F.2d 605 (8th Cir. 1972); *York Chrysler-Plymouth, Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971); *Kavanaugh* v. *Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965). However, it is vital to note that in these cases the corporate automobile dealer had not already recovered damages for injuries sustained from the same transactions upon which plaintiff-shareholders based their claims for relief. The rule in those cases should not apply where, as in the instant controversy, there appears no reason to pierce the "corporate veil" and to disregard the corporate entity. In each of those cases, as Judge Dooling emphasized, the individual's standing had not been "tested against such a competing interest as that of creditors or that of a centralized administration in insolvency proceedings." (220)

Not one of the three appellate cases under the Automobile Dealers Franchise Act cited by plaintiff come close to the facts presented here: where the plaintiffs, officers and shareholders of the corporate dealer, put the dealer into voluntary bankruptcy and the corporate dealer had previously asserted claims which were compromised and released by the trustee in that bankruptcy and were approved by the court over objection by the officers and shareholders. Nothing stated or implied even remotely in those three cases could be construed to give the Act so broad a reading as to subvert the broad powers of the federal courts sitting in bankruptcy.

In *Kavanaugh* v. *Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965), the Sixth Circuit took great pains to point out how all the franchise agreements pointed to a single individual, plaintiff Kavanaugh, as the actual "automobile dealer" as defined in § 1221(c) and as protected under the Act, whereas exclusive recognition of the corporate form of the nominal dealer would have prevented any recovery whatsoever, because that corporation was at *all* relevant times owned by the defendant manufacturer. (353 F.2d at 712 & n.3, 717). Thus, not to give Kavanaugh the status of a "dealer" entitled to sue under the statute "effectively insulates Ford from liability under the act. It is inconceivable that [defendant], owning all the voting stock of the dealership corporation and being in complete control of it, would ever seek the protection afforded by the statute." (353 F.2d at 717). Thus, the court like its predecessor in *Ritchie* v. *McMullen*, 79 Fed. 522 (6th Cir. 1897), and the New York Court of Appeals in *General Rubber Co.* v. *Benedict*, 215 N.Y. 18, 109 N.E. 96 (1915), permitted suit by a shareholder in a direct action claiming injury to the corporation because to hold otherwise might deny any substantial remedy for an admitted wrong. It was evident that Ford had devised its contractual arrangements with the dealer to subvert the statutory purpose.

In *Lewis* v. *Chrysler Motor Corp.*, 456 F.2d 605 (8th Cir. 1972), the court of appeals expressly stated, "We do not find it necessary to approve or disapprove the Seventh Circuit's analysis [in *Kavanaugh, supra*] based on disregard of the corporate entity." (456 F.2d at 606, n.2.) Instead, the court reversed the district court's dismissal of an individual's claim as an "automobile dealer" because the appellate court believed that his status "could not be adequately considered by the District Court on the limited record before it" (456 F.2d at 607) and instead noted that such an issue should be decided on affidavits and extensive

documents as in *Kavanaugh*, as was also the case in the court below. (456 F.2d at 606, n.2.)

The third case, *York Chrysler-Plymouth, Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971), is the only one cited in which a money judgment was rendered for the individual stockholders and officers of the corporate dealer, but it was based on a jury verdict in favor of the plaintiff corporation jointly with the individual shareholders, so that the verdict and judgment represented a *single* theory of liability and a *single* injury and package of economic damages, thereby avoiding the danger of duplicative recoveries. Thus, the *York* case, where the plaintiff corporation and stockholders received *one* recovery for *one* legal injury under *one* jury verdict in no way sustains plaintiffs' plea herein for damages in addition to those obtained by L. I. Reo's trustee in bankruptcy.

Whatever the defects in plaintiffs' case with respect to a "dealer" entitled to recovery under the statutes, the statutes and decisions should not permit duplicate recovery for violation of the same duty and for identical injury to the same person. As has already been pointed out numerous times and as has been stated by the court below, plaintiffs cannot show individual injury as "automobile dealers" separate and apart from any alleged injury done to L. I. Reo.

POINT III

Plaintiffs' underlying claims were settled by L. I. Reo's trustee in bankruptcy pursuant to court order.

In August 1967, as directors and officers of L. I. Reo, some of the plaintiffs herein caused L. I. Reo to petition the Bankruptcy Court for the voluntary adjudication of bankruptcy of L. I. Reo. (271, 300) An order dated August

27, 1968, was made in the bankruptcy proceedings authorizing and directing the trustee in bankruptcy of L. I. Reo to compromise and settle, with prejudice, the bankrupt's claims against defendants herein. (218-219, 406) The claims of L. I. Reo in the bankruptcy proceeding were identical to plaintiffs' claims in the instant case. (406) Those claims were assets of the bankrupt corporation. Because they vested with L. I. Reo and stated corporate claims, they cannot now be reasserted by plaintiffs. The settlement of the corporate claims by the trustee in bankruptcy precludes further action on the same claims.

Plaintiffs apparently argue that because the compromise did not specifically provide for the shareholders (who, in any event, might have recovered for the loss in the value of their shares through the corporation's compensation) and because, they theorize, the trustee in bankruptcy is "in no sense a representative of the stockholders", the compromise should not affect their rights as shareholders. (Brief of Plaintiffs-Appellants, p. 43.)

It is, of course, true that if the shareholders had individual causes of action arising out of the facts alleged in the complaint, the trustee in bankruptcy would have had no power to settle them. The trustee only represents the claims held by the corporate debtor. However, this also includes corporate claims that could have been asserted derivatively by the shareholders in a properly pleaded complaint.

Although plaintiffs cite § 70.04 in *Collier on Bankruptcy* (2d ed. 1971), they do not complete the thought contained therein. (Brief of Plaintiffs-Appellants, p. 42.) The paragraph discusses an aspect of Section 70 of the Bankruptcy Act which deals with the title in the bankrupt's property vested in the trustee in bankruptcy, including causes of action. While it is true that the "trustee does not repre-

sent and does not succeed to the rights of the stockholders of a corporate bankrupt," he does represent the stockholders "insofar as their rights are derived from the corporation." (4A Collier on Bankruptcy § 70.04, at page 53 & n. 13 (1971).)

This is exactly the point. Shareholders asserting derivative rights are acting in place and instead of the corporation itself. In bankruptcy, the trustee stands in this same position. Since any of the rights plaintiffs seek to maintain as shareholders of L. I. Reo are derived from the corporation, it is clear under plaintiffs' own authority that the trustee in bankruptcy could, and did, by settling and releasing L. I. Reo's claim against defendants, bar another suit on the same issues by L. I. Reo's shareholders. Plaintiffs have no claim for relief left against defendants.

Judge Dooling, in his second memorandum and order, called this the "critical and irremediable defect" in the "inescapable nature of the alleged wrongs."

> "*The claims sued upon are very precisely those which the trustee in bankruptcy asserted against White and Kommer and settled,* as all agree, on very substantial terms pursuant to order of the Referee in Bankruptcy. . . . Clearly, the settlement and discontinuance preserved the rights of White against Mr. Vincel and of Mr. Vincel against White and Kommer. The most evident alleged right that it may be inferred that White sought to preserve against Mr. Vincel is the right relied on in White's First Counterclaim. . . . What rights Mr. Vincel meant to reserve is not clear, but no doubt would include any arising out of the transactions giving rise to White's alleged right against him. But the controlling circumstance is that White could not again assert rights against L. I. Reo or its trustee

in bankruptcy nor could Mr. Vincel assert, in his own or any other name, the right of L. I. Reo or the creditors of L. I. Reo, for the Trustee in Bankruptcy had settled their claims on notice to and over the objection of Mr. Vincel after hearing and with the approval of the bankruptcy judge. The Trustee's rights of suit embraced the totality of the damaging wrongs allegedly inflicted on L. I. Reo by White and Kommer, and by the settlement, the Trustee reduced those claims to his possession and, under judicial supervision, released them wholly. Nothing of them remained for transfer to or survival to Mr. Vincel and his fellow stockholders. See *Bayliss* v. *Rood,* 4th Cir. 1970, 424 F.2d 142, 146-147. *Graybar Electric Co.* v. *Doley,* 4th Cir. 1959, 273 F.2d 284, 292; *Schmitt* v. *Jacobson,* D. Mass. 1968, 294 F. Supp. 346, 348; *Stephen* v. *Merchants' Collateral Corp.,* 1931, 256 N.Y. 418." (Emphasis added.) (406-08)

The case law is in agreement with this conclusion. In *Bayliss* v. *Rood,* 424 F.2d 142 (4th Cir. 1970), the trustee of a bankrupt corporation successfully prosecuted an action on its behalf against its officers and directors for improper withdrawal of funds from the corporation. Appellant argued that because the trustee primarily represents the creditors and since appellant had not breached a duty to creditors, the action could not stand. The court summarily dismissed this contention:

> "Bayliss contends that the trustee represents the creditors of a bankrupt, that the fiduciary relationship of an officer or director of a bankrupt corporation does not extend to creditors of the corporation, and therefore, he . . . should not be held responsible to the Trustee. We find no merit in this contention. A trustee in bankruptcy represents

and stands in the place of the bankrupt itself and can enforce rights of action which the bankrupt could have enforced. Bankruptcy Act Section 70 (11 U.S.C. § 110(a)(j)). As the Court stated in Pepper v. Litton, 308 U.S. 295, 307, 60 S.Ct. 238, 84 L.Ed. 281 (1939):

> 'While normally the *fiduciary obligation* [of the dominant stockholder, director or officer] is enforceable directly by the corporation, or through a stockholder's derivative action, *it is, in the event of the bankruptcy of the corporation, enforceable by the trustee. For that standard is designed for the protection of the entire community of interest in the corporation—creditors as well as stockholders.*' (emphasis added)'' (424 F.2d at 141)

See also *Stephen* v. *Merchants Collateral Corp.*, 256 N.Y. 418, 176 N.E. 824 (1931), in which the New York Court of Appeals dismissed a shareholders' derivative action which sought to assert the right of a bankrupt corporation against its officers and directors on the grounds that only the trustee in bankruptcy has the right to bring the action.

Pursuant to Section 70 of the Bankruptcy Act, the trustee in bankruptcy is vested with the title of the bankrupt in all property, including rights of action, which prior to the filing of the petition in bankruptcy, the bankrupt could have transferred. The trustee, in general, has the option of commencing or continuing the actions and settling or compromising them in the best interest of the estate. Where the trustee has the right to assert corporate rights they may not be utilized by other persons. *Skelton* v. *Clements*, 408 F.2d 353 (9th Cir. 1969); *Graybar Elec. Co.* v. *Doley*, 273 F.2d 284 (4th Cir. 1959); *Grauman* v. *City Co.*, 113 F.Supp. 437 (S.D.N.Y. 1941).

In *Schmitt* v. *Jacobson,* 294 F. Supp. 346 (D. Mass. 1968), a trustee in bankruptcy brought an action against officers, directors and stockholders of the bankrupt on behalf of the corporation and certain shareholders. The action on behalf of the shareholders which was not derivative was dismissed.

> "Where directors mismanage a corporation, and it becomes bankrupt, the trustee in bankruptcy succeeds to the corporation's claims against the directors. This truism is sometimes forgotten because the garden-variety of action against corporate directors seems, but only seems, to be brought as a stockholder's direct action against the directors. In fact, the stockholder's action is derivative. He presents the corporation's claims against the directors. When the corporation has become bankrupt the claim of the corporation inures to the trustee. Mr. Justice Douglas spelled this out in *Pepper* v. *Litton,* 308 U.S. 295, 306-307, 60 S. Ct. 238, 245, 84 L.Ed. 281. 'A director is a fiduciary * * * [H]is powers are powers in trust. * * * While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community as well as stockholders." 294 F. Supp. at 348. See also 9 Am. Jur. 2d, Bankruptcy § 933, at p. 699 (1963) for other cases.

Thus, this action is easily dealt with. Plaintiffs' allegations present a wrong, if any, against L. I. Reo. These claims passed to the trustee in bankruptcy and were settled by him.

> "Such a settlement concludes the assertion of the same claims for redress of the same wrongs damaging the corporate business when the stockholders of the bankrupt seek to assert in their own interest that same claim for the same damage reflected on the bankrupt corporation, whether the stockholders simply mistakenly regard the corporate claim for damages as their own, or rely on a supposed undertaking with them by the alleged wrongdoers that the latter would not inflict those wrongs on the corporation. The claim satisfied by the trustee's settlement is the claim sought to be asserted in the present recorded complaint for damages allegedly wrongfully inflicted on the corporate business by White and Kommer, and that the claim can have but a single satisfaction, the one extended by the trustee." (411)

The plaintiffs, being all of the shareholders, having had a right to sue derivatively which was asserted and compromised in bankruptcy, cannot now relitigate that claim.

Tue 82)

Brief
2 Fee

Service of three (3) copies of the within
is hereby admitted
this 2nd day of January, 1975
Myron S. Isaacs & Robert L. Stone
Attorney(s) for Plaintiff